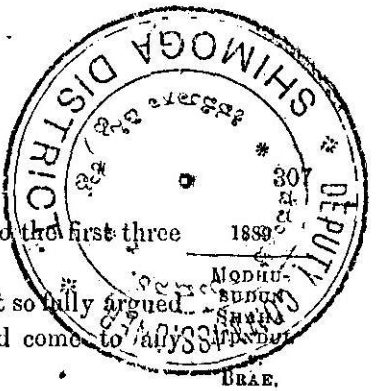

1889

MODHU-SUDUN SHAHA v. SHIB CHUNDER BRAE.

On the above assumption our answer, therefore, to the first three questions is in the negative.

As to the fourth question, the matter was not so fully argued before us as to make it desirable that we should come to any decision upon it.

The result is that we allow the appeals, set aside the decrees of the Lower Appellate Courts in both suits, and remand the cases for a decision on the merits. The respondent to pay the costs of the appeal in each case.

T. A. P. *Appeals allowed.*

PRIVY COUNCIL.

HEWANCHAL SINGH AND ANOTHER (PLAINTIFFS) *v.* JAWAHIR SINGH (DEFENDANT.)

P. C.*
1888
November 3.

[On appeal from the Court of the Judicial Commissioner of Oudh.]

Redemption right of—Redemption claimed under terms of mortgage—Insufficient tender of mortgage money—Transfer of Property Act (IV of 1882), ss. 60, 83, and 84.

According to the judgment of the Appellate Court below, a mortgagor, having liberty by the terms of his mortgage to redeem at the end of its second year, on payment of the whole of the principal and interest, was not entitled to a decree for redemption, in a suit brought after the close of the second year, on showing only that in the first half of the second year, the principal money had been deposited in Court, and that for the interest, for both years, decrees had been obtained by the mortgagee against him, before his suit was instituted. The above not showing payment or tender of the interest, of which payment was secured by the mortgage, an appeal was dismissed.

APPEAL from a decree (9th November 1885) of the Judicial Commissioner, reversing a decree (30th July 1885) of the District Judge of Sitapur. A mortgage, dated 9th February 1883, secured repayment of Rs. 14,500 with interest, by the appellants to the respondent, and contained the following: "The first condition is that the term of the mortgage has been settled as eight years; within this term the mortgage may be redeemed upon payment of the entire sum, according to the conditions of the mortgage-bond at the close of the second, fourth, or

* *Present:* LORD FITZGERALD, LORD HOBHOUSE, and SIR R. COUCH.

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eighth year. The second condition is that interest shall be paid year after year at one per cent. per mensem, and that if the mortgagor fail to pay interest at the end of any year, the mortgagee shall be at liberty to realize the interest and costs by suit." The mortgagors made default in payment of the interest Rs. 1,740, due at the end of the first year, and for this a decree was obtained by the mortgagee on the 2nd May 1884. On the 30th June 1884 (*i.e.*, in the first half on the second year, and before its close) the mortgagors brought into Court the principal amount only, Rs. 14,500, and made an application, purporting to be under the 83rd section of the Transfer of Property Act, IV of 1882, asking to have the mortgagee summoned, and the above sum credited in the deposit account, and paid, in order that the mortgagors might then redeem.

The District Judge, on the ground that the mortgagors had, by the deed, no right of redemption before the end of the second year, dismissed the application on the 23rd September 1884.

On the 14th and 27th January 1885, the mortgagee notified to the mortgagors that he was willing to accept the mortgage money and reconvey, but that if they did not so redeem, they could not do so till the end of the fourth year.

The appellants did no more, leaving the principal money in Court, and they did not, at the close of the year, renew their application under the 83rd section, or pay into Court, or to the mortgagee, the interest due for the second year. For this the mortgagee sued, and obtained a decree, on the 15th May 1885, in the Court of the Subordinate Judge.

In that suit the mortgagors raised, in effect, a similar question to the present, contending that, as they had previously deposited the principal money, no interest was due for the second year, reference being had to the 84th section of Act IV of 1882; but the Subordinate Judge held the mortgagee entitled to the interest due for the second year. On the day of the date of that decree the mortgagors filed their plaint in the present suit, in which they contended that, as the defendant-mortgagee had obtained a decree for the first year's interest, and had no right to interest for the second year, he having refused to accept the principal amount which was still in

deposit, they, the plaintiffs, were entitled to redeem, on payment of the sum deposited, or such amount as might be found due to the mortgagee, on a correct and valid account being made up.

The issues raised questions as to the plaintiffs' right of redemption in the second year, and as to the sufficiency of their tender.

The District Judge held that, as the suit had been instituted after the expiration of the second year of the mortgage, one of the periods at which it was redeemable by its terms, when the principal amount was in deposit in Court, and the mortgagee had obtained a decree for the interest of that year, "the plaintiffs' tender was sufficient on the day of the suit." He stated in his judgment that on the 25th June 1885, *i.e.*, about six weeks after the institution of the suit, the mortgagee had attached the deposit in Court, in satisfaction of his decree for the second year's interest.

The Judicial Commissioner, on the mortgagee's appeal, reversed this decree, referring to the fact that on the 9th February 1885, interest had not been paid, nor tendered, nor placed at the mortgagee's disposal by deposit in Court. He held that, therefore, the condition relating to redemption had not been fulfilled at the close of the second year, when the suit was brought, and that it ought to have been dismissed.

In this appeal it was alleged that the decrees for interest obtained by the mortgagee, and the deposit of the principal in Court, had left nothing due under the mortgage.

Mr. *J. D. Mayne* appeared for the appellants.

Mr. *R. V. Doyne*, and Mr. *Theodore Thomas*, for the respondent, were not called upon.

The appellants' case having been stated, LORD FITZGERALD intimated that the deposit, or tender, at a proper time, of the mortgage money, which included the interest due, had not appeared; and their Lordships dismissed the appeal.

Appeal dismissed.

Solicitors for the appellants: Messrs. *T. L. Wilson & Co.*

Solicitors for the respondent: Messrs. *Barrow & Rogers.*

C. B.